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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GLORIA PEREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for possessing marijuana with the intent to distribute it because the government obtained a consent judgment in a civil action that sought the forfeiture of respondent's property on the ground that it had been used to facilitate drug activities.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 70 F.3d 345. The order of the district court denying respondent's motion to dismiss the indictment (App., *infra*, 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1995. A petition for rehearing was denied on March 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841(a)(1) and 881(a)(4) are reproduced at App., *infra*, 18a-21a.

STATEMENT

A grand jury in the United States District Court for the Southern District of Texas returned an indictment charging respondent with possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Before trial, respondent moved to dismiss the indictment on the ground that her conviction and punishment on the indictment would violate the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion, and respondent took an interlocutory appeal. The court of appeals reversed and remanded with instructions to dismiss the indictment. App., *infra*, 1a-14a.

1. On September 26, 1993, Border Patrol officers at the Falfurrias, Texas, check point discovered 93 kilograms of marijuana inside the Chevrolet Suburban that respondent was driving. The officers arrested respondent and seized the Suburban. On November 10, 1993, respondent was indicted on a single count of possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). See App., *infra*, 2a; C.A. Record Excerpts, at Tab 2.[1]

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[1] The court of appeals' opinion mistakenly states that 96 (rather than 93) kilograms of marijuana were seized from respondent.

On January 26, 1994, the United States filed an *in rem* civil complaint seeking forfeiture of the Suburban. The complaint alleged that the vehicle was subject to forfeiture under 21 U.S.C. 881(a)(4) because it had been used to transport the marijuana seized from respondent on September 23, 1993. On October 6, 1994, respondent and the United States filed a "Stipulation of Settlement" in which respondent agreed that the Suburban would be forfeited to the United States. On October 11, 1994, the district court entered an "Agreed Order of Forfeiture and Dismissal" that ordered the forfeiture of the Suburban and the dismissal of the forfeiture action. See Gov't C.A. Br. 2-3.

On October 31, 1994, respondent moved to dismiss the indictment. She claimed that the forfeiture of the Suburban punished her for the offense charged in the indictment and thus that any punishment she received for that offense in the criminal prosecution would violate the Double Jeopardy Clause. At a hearing on respondent's motion, a DEA Special Agent testified that the cost to the government of investigating the case against respondent amounted to approximately $11,000, not including the costs incurred by the United States Attorney's office and the district court. The agent also testified that the marijuana had a street value of approximately $128,000, and that the value of the Suburban was approximately $22,000. App., *infra*, 2a-3a.

The district court denied the motion. App., *infra*, 15a-17a. Relying on *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994), cert. denied, 115 S. Ct. 573, 574 (1995), the court held that the forfeiture of the Suburban was remedial, not punitive, because "the forfeiture of instruments of drug trafficking serves

the remedial purpose of removing the 'tools of the trade' from the hands of those who would likely engage in further drug crimes." App., *infra*, 16a. In addition, the court found the cost of the prosecution "to be in excess of $11,000" and that that figure did not include "the costs of the United States District Clerk's office, the costs of the U.S. Attorney's office, and the costs of the grand jury which indicted the defendant." *Id.* at 16a-17a. The $11,000 figure, the court noted, "also fails to consider the costs borne by society" from the sale of $128,000 in illegal drugs. *Id.* at 17a. The court accordingly concluded that the value of the Suburban, which the court found to be $23,000, was "not overwhelmingly disproportionate to the costs borne by the government in prosecuting this case or the costs to society from this defendant's alleged wrongful conduct." *Ibid.*

2. The court of appeals reversed. App., *infra*, 1a-14a. The court acknowledged that the determination whether a civil sanction imposes punishment "is typically effected as a case-by-case proportionality review: If the sanction is overwhelmingly disproportionate to the damages caused by a defendant's wrongful conduct, it constitutes punishment." *Id.* at 7a (citing *United States* v. *Halper*, 490 U.S. 435, 449 (1989)). Relying on *Austin* v. *United States*, 509 U.S. 602 (1993), however, the court declined to apply that approach to determining whether the forfeiture of respondent's vehicle constituted punishment. According to the court, *Austin* took a "categorical approach" to forfeitures under Section 881(a)(4) and that approach "obviates the need for proportionality review of the kind conducted by the district court in this

case." App., *infra*, 9a.[2] On the basis of that "categorical approach," the court found that the forfeiture of the Suburban punished respondent for the same offense alleged in the indictment. The court accordingly remanded with instructions to dismiss the indictment. *Id.* at 11a.

3. On January 12, 1996, this Court granted the United States' petitions for writs of certiorari in *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (1995), cert. granted, 116 S. Ct. 762 (1996), and *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996), to consider whether and to what extent *in rem* civil forfeiture under 21 U.S.C. 881 constitutes punishment barred by the Double Jeopardy Clause. On January 19, 1996, the United States filed a timely petition for rehearing in this case. The petition informed the court of appeals of the grants of certiorari in *Ursery* and *$405,089.23*, and it asked the court of appeals to hold this case pending this Court's rulings in *Ursery* and *$405,089.23*. On March 4, 1996, the court of appeals denied the government's petition.

REASONS FOR GRANTING THE PETITION

This case presents the same question as *United States* v. *Ursery*, No. 95-345, cert. granted, 116 S. Ct. 762 (1996) (argued April 17, 1996), and raises issues

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[2] The court acknowledged that its prior decision in *Tilley*, which was decided after *Austin*, "almost precisely mirror[s]" this case. App., *infra*, 9a. It distinguished *Tilley*, however, on the ground that *Tilley* had involved the forfeiture of the proceeds of drug trafficking under 21 U.S.C. 881(a)(6) and "the forfeiture of drug proceeds is always directly related to" the "government's and society's damages and costs." App., *infra*, 10a.

that are also presented in *United States* v. *$405,089.23*, No. 95-346, cert. granted, 116 S. Ct. 762 (1996) (also argued April 17, 1996). All three cases concern the double jeopardy implications of parallel civil forfeiture and criminal proceedings. In particular, the issue in both *Ursery* and this case is whether the Double Jeopardy Clause bars the respondents' criminal prosecution for marijuana offenses because the government obtained a consent judgment in a civil action that sought the forfeiture of respondents' property on the ground that it had been used to facilitate drug activities. In this case, the court of appeals agreed with the court of appeals in *Ursery* that the prior civil forfeiture judgment barred the subsequent criminal prosecution. Because the resolution of *Ursery* and *$405,089.23* will affect the disposition of this case, this petition should be held pending the Court's decision of those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346, and then disposed of accordingly.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JUNE 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-60788

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GLORIA PEREZ, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Nov. 21, 1995

Before: KING, SMITH and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This matter involves a challenge to a continuing prosecution as a violation of the Double Jeopardy Clause of the Fifth Amendment. The district court denied a motion to dismiss the indictment. Concluding that the prosecution violates the Double Jeopardy Clause, we reverse and remand with instructions to dismiss the indictment.

I

Defendant Gloria Perez and her four children entered the United States in a private vehicle via the border checkpoint at Falfurrias, Texas. Border Patrol officers discovered ninety-six kilograms of marihuana in the vehicle, arrested Perez, and seized the vehicle.

A grand jury issued an indictment charging Perez with possession of marihuana with intent to distribute, a violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The United States then brought an *in rem* civil proceeding seeking forfeiture of the vehicle under 21 U.S.C. § 881(a)(4).

Perez and the government filed a "Stipulation of Settlement" in which Perez agreed that the car would be forfeited to the United States. The district court approved the "Stipulation of Settlement" in an "Agreed Order of Forfeiture and Dismissal," in which the court ordered forfeiture of the vehicle and dismissal of the forfeiture action.

Perez moved to dismiss the indictment, claiming that the ongoing criminal prosecution violated the Double Jeopardy Clause's prohibition against multiple punishments. The district court denied the motion.

During the hearing on the motion to dismiss, the court heard evidence with regard to the forfeiture. A special agent of the Drug Enforcement Administration testified that the government's costs for investigating the Perez case amounted to $11,000, not including the costs of the United States Attorney or of the district court. This agent also testified that the street value of the marihuana was about $128,000 and that the proceeds from sales of the drug probably

would have left the country. The agent calculated the value of the vehicle at $22,000, Perez testified that she had paid $31,000 for it.

The court's denial of the motion included a proportionality review of the forfeiture, which involved consideration of whether the amount forfeited bore a rational relation to the government's costs. The court found that it did and that the forfeiture removed a "tool of the [drug] trade" from Perez. The court also found that the value of the car was $23,000, that the forfeiture was not overwhelmingly disproportionate to the government's costs, and that the forfeiture therefore bore a rational relation to a remedial purpose: reimbursing the government and society for the costs of Perez's allegedly wrongful conduct.

II

The government claims that we have no jurisdiction to hear Perez's appeal, noting the federal law's general disapproval of interlocutory appeals, particularly in criminal cases. *See Abney v. United States*, 431 U.S. 651, 656-57, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977) (opining that such appeals are generally disfavored). Despite this underlying presumption, however, federal courts have entertained interlocutory appeals from orders denying dismissal of an indictment on double jeopardy grounds. *Id.* at 651, 97 S.Ct. at 2035-36; *United States v. Tilley*, 18 F.3d 295 (5th Cir.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994); *see generally Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (holding certain collateral orders appealable). The *Abney* Court held that federal courts of appeals may hear double jeop-

ardy claims on interlocutory appeal under the collateral order doctrine of *Cohen*:

> [S]uch orders fall within the small class of cases that Cohen has placed beyond the final judgment rule. In the first place there can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim . . . .
>
> Moreover, the *very nature* of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, whether or not the accused is guilty of the offense charged.

431 U.S. at 659, 97 S.Ct. at 2040 (emphasis added).

The government tries to distinguish *Abney* on the ground that *Abney* involved a multiple-prosecution double jeopardy analysis, not a multiple-punishment analysis as in this case. That argument is foreclosed by *Tilley*, in which we took jurisdiction under *Abney*, without discussion, of an interlocutory appeal from a refusal to dismiss an indictment. *See Tilley*, 18 F.3d at 297. The motion to dismiss in *Tilley* made the same double jeopardy argument that Perez makes here (a violation of the clause's prohibition on multiple punishments). *Cf. id.* Given *Abney* and *Tilley*, there is no question that we have jurisdiction over Perez's appeal.

III

A recent Supreme Court decision resolves the ripeness question although the case before the Court did not have precisely the same posture as does the one before us. In *Witte* v. *United States*, —— U.S. ——, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), the

government appealed a district court order granting a defendant's motion to dismiss an indictment based on the multiple punishments prong of the Double Jeopardy Clause. *Id.* at ——, 115 S.Ct. at 2203-04. On appeal, a panel of this court reversed and remanded, and that judgment was affirmed, with the Court holding the case to be ripe for appellate review even though the defendant had not yet been convicted of the charges in the contested indictment. *Id.* at ——, 115 S.Ct. at 2205.

The defendant in *Witte* had pleaded guilty to conspiring and attempting to possess marihuana with intent to distribute. *Id.* at ——, 115 S.Ct. at 2202-03. During sentencing, the district court took into account evidence of uncharged criminal conduct relating to cocaine and enhanced the defendant's sentence based upon that evidence. *Id.* at ——, 115 S.Ct. at 2203. A subsequent indictment on the cocaine charges issued and was dismissed on the ground that the conduct forming the basis of the indictment had already been used to "punish" the defendant when his sentence on the marihuana counts had been enhanced, thus creating a double jeopardy violation. *Id.* at ——, 115 S.Ct. at 2203-04.

In *Witte*, as in *Perez*, there was some question as to whether the defendant had been placed in jeopardy prior to the contested indictment. In *Perez*, the prior proceeding alleged by defendant to have placed her in jeopardy was a civil forfeiture proceeding. In *Witte*, the prior proceeding was a sentencing in which the conduct forming the basis of the contested indictment had been taken into account.

The analysis in *Witte* demonstrates that the case before us is ripe:

> Petitioner nevertheless argues that, because the conduct giving rise to the cocaine charges was taken into account during sentencing for the marijuana conviction, he effectively was "punished" for that conduct during the first proceeding. As a result, he contends, the Double Jeopardy Clause bars the instant prosecution. This claim is ripe at this stage of the prosecution—although petitioner has not yet been convicted of the cocaine offenses—because, as we have said, "courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." . . . *Thus, if petitioner is correct that the present case constitutes a second attempt to punish him criminally for the same cocaine offenses . . ., then the prosecution may not proceed.*

Id. at ——, 115 S.Ct. at 2204-05 (emphasis added, internal citations omitted). Thus, if Perez is correct that the present case constitutes a second attempt to punish her criminally for the same marihuana offenses, the prosecution may not proceed.[1]

IV

The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. AMEND.

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[1] A sister circuit recently characterized *Witte* as "holding that a multiple punishments double jeopardy claim is ripe for appellate review even where the claimant has yet to have been a second time convicted." *See United States v. Baird*, 63 F.3d 1213, 1215 (3d Cir.1995), *petition for cert. filed* (Oct. 17, 1995) (No. 95-630).

V. The courts have interpreted this clause to provide protection from both multiple prosecutions (after either an acquittal or a conviction) and multiple punishments. *See, e.g., Witte*, —— U.S. at ——, 115 S.Ct. at 2204. In the case before us, the parties agree that only the multiple punishments prong is at issue.

The core issue in *Perez* is the same as that faced in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989): "[W]hether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." *Id.* at 446, 109 S.Ct. at 1901.[2] Announced in *Halper*, the governing legal standard for resolving this issue is whether the civil sanction serves solely a remedial purpose, or also a retributive or deterrent purpose. *Id.* at 448, 109 S.Ct. at 1901-02. If the latter is true, the sanction constitutes punishment for purposes of double jeopardy analysis.

This standard is typically effected as a case-by-case proportionality review: If the sanction is overwhelmingly disproportionate to the damages caused by a defendant's alleged wrongful conduct, it constitutes punishment. *See id.* at 449, 109 S.Ct. at 1902. Such a proportionality review must include an accounting of the government's damages and costs, see id., to determine whether the sanction was disproportionate. The damages and costs borne by society as a result of the defendant's unlawful conduct are also to be considered. *See Tilley*, 18 F.3d at 298-300.

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[2] The procedural posture of *Halper* is different, however; the defendant had been convicted of various criminal offenses in the first proceeding, and the second, contested proceeding was an ongoing civil forfeiture.

Austin v. United States, —— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), however, has had a major impact on the application of the *Halper* test. In *Austin*, the Court held that civil forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment. *Id.* at ——, 113 S.Ct. at 2803. *Austin* was not a double jeopardy case, but the *Austin* Court's analysis did include a determination of whether civil forfeitures constitute "punishment," see *id.* at ——, 113 S.Ct. at 2806. Furthermore, it explicitly relied, at least in part, on the *Halper* punishment test to make that determination. *Id.* at ——, 113 S.Ct. at 2812; *United States v. $405,089.23*, 33 F.3d 1210, 1219 (9th Cir.1994), *amended on denial of reh'g en banc*, 56 F.3d 41 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

Austin focused on two statutory forfeiture provisions, 21 U.S.C. §§ 881(a)(4) and 881(a)(7). The former is the one before us now. The *Austin* Court concluded that all civil forfeitures under both subsections constitute punishment. —— U.S. at ——, 113 S.Ct. at 2812. In drawing the punishment/non-punishment distinction for excessive fines cases involving these statutory provisions, the *Austin* Court applied the same test used to make the punishment/non-punishment distinction in double jeopardy cases—*i.e.*, the *Halper* test. *Id.* at ——, 113 S.Ct. at 2812; *$405,089.23*, 33 F.3d at 1219; *see United States v. Ursery*, 59 F.3d 568, 573 (6th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95- 345).

The *Austin* Court specifically rejected a case-by-case approach to the punishment determination for §§ 881(a)(4) and 881(a)(7). See —— U.S. at —— - ——

& n. 14, 113 S.Ct. at 2810-12 & n. 14; *$405,089.23*, 33 F.3d at 1220 (citing *Austin*, —— U.S. at —— n. 14, 113 S.Ct. at 2812 n. 14). In *Austin*, the Court explicitly claimed to focus on the two statutory provisions "as a whole" rather than as individually applied (rejecting *Halper*'s approach), stating that "[t]he value of conveyances and real property forfeitable under §§ 881(a)(4) and 881(a)(7) . . . can vary so dramatically than any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." —— U.S. at —— n. 14, 113 S.Ct. at 2812 n. 14 (citation omitted). Having concluded that "forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,'" *id.* at ——, 113 S.Ct. at 2812 (citation omitted), the *Austin* Court announced that such forfeitures constitute punishment *per se*. *See Ursery*, 59 F.3d at 573. This categorical approach for such civil forfeitures—requiring them always to be considered as punishment—obviates the need for proportionality review of the kind conducted by the district court in this case.

Tilley, which was issued after *Austin*, offers the government no refuge. It is true that the *Tilley* court declined to extend an *Austin*-style *per se* approach to civil forfeitures brought under § 881(a)(6) (forfeiture of drug proceeds), a sister provision of the one at issue in this case. See *Tilley*, 18 F.3d at 298-99. Rather, we decided to apply a Halper-style case-by-case approach to the facts of *Tilley*. *See id.*

It is also true that the facts of *Tilley* almost precisely mirror those of the case before us. The government had filed the civil forfeiture claim prior to the issuance of the indictment; as in this case, however, the forfeiture claim was disposed of prior to

the indictment. *Id.* at 297. In fact, the forfeiture proceeding was resolved by means of a "stipulated forfeiture agreement," *id.*, just as in the instant case. The overall postures of the cases are identical: Both defendants brought an interlocutory appeal of a denial of a motion to dismiss the indictment on double jeopardy grounds (specifically, the multiple punishments prong).

Despite these similarities, *Tilley* does not dispose of the case before us. The *Tilley* court was faced with a statutory provision (§ 881(a)(6)) to which the logic of *Austin* does not apply, and which is therefore distinctly different from the provision before us in *Perez* (§ 881(a)(4)). *See Tilley*, 18 F.3d at 300.

The *Tilley* court held that, while the forfeitures of conveyances and real property may not have any correlation to (nor proportionality with) the government's and society's damages and costs, the forfeiture of drug proceeds is always directly related to such damages (as approximated by the amount of drugs sold): "The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus, the logic of *Austin* is inapplicable to § 881(a)(6)—the forfeiture of drug proceeds." *Id.* By distinguishing *Austin* thus—*i.e.*, acknowledging that forfeitures of conveyances are never proportional to the government's damages, except perhaps by coincidence—the *Tilley* court acknowledged that the purpose of § 881(a)(4) is, at least in part, to punish.

Perez's ongoing prosecution thus constitutes a second attempt to punish her criminally for the same marihuana offenses that were involved in the civil forfeiture. It therefore violates the Double Jeopardy

Clause and may not proceed. See *Witte*, —— U.S. at —— - ——, 115 S.Ct. at 2204-05. No proportionality review was required. Accordingly, we REVERSE the district court's denial of Perez's motion to dismiss and REMAND with instructions to dismiss the indictment.

KING, Circuit Judge, specially concurring:

I concur in the panel's opinion and judgment because I think both are logical extensions of the court's opinion in *United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994). I write separately to note the confusion that has been generated by the Court's decisions in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), and *Austin v. United States*, —— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). *Perez* is a good example of that confusion; it stands *Halper* on its head, but not without support from *Austin*, or at least from *Austin* as construed (not unreasonably) by *Tilley*.

Traditionally, the civil forfeiture of property involved in criminal activity and the criminal prosecution of the property's owner for the same underlying conduct did not raise issues under the Double Jeopardy Clause. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66, 104 S.Ct. 1099, 1105-07, 79 L.Ed.2d 361 (1984). The question, which cries out for resolution by the Supreme Court, is whether, or to what extent, *Halper* and *Austin* have changed that rule.

The Court recognized in *Halper* that the government may exact civil sanctions that achieve "rough remedial justice" without raising double jeopardy concerns. Accordingly, under *Halper* it is ordinarily

necessary to examine the particular civil sanction imposed on a case-by-case basis to determine whether it constitutes "punishment" for double jeopardy purposes. *Halper*, 490 U.S. at 448, 109 S.Ct. at 1901-02; *see also id.* at 452-53, 109 S.Ct. at 1904 (Kennedy, J., concurring). Then along came *Austin*, which held that the forfeiture provisions of 21 U.S.C. §§ 881(a)(4) (dealing with conveyances, or means of transporting drugs such as automobiles) and 881(a)(7) (dealing with real estate used in drug transactions) impose "punishment" for purposes of the threshold applicability of the Eighth Amendment's Excessive Fines Clause. Although it might have been possible to read *Austin* more narrowly in a case arising under the Double Jeopardy Clause,[3] this court, in dicta in *Tilley*, read it to call for the categorical conclusion that all civil "forfeitures of conveyances and real estate have no correlation to, or proportionality with, the costs incurred by the government and society because of the large and unpredictable variances in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the

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[3] The Court in *Austin* stated that "it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial." *Austin*, —— U.S. at —— n. 14, 113 S.Ct. at 2812 n. 14. That was true because the Eighth Amendment prohibits only excessive fines and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." *Id.* This suggests that perhaps a distinction should be drawn between the Double Jeopardy Clause and the Excessive Fines Clause when it comes to forfeitures under §§ 881(a)(4) and (a)(7), at least where those forfeitures may be found to be purely remedial in nature.

criminal act." *Tilley*, 18 F.3d at 300. That conclusion certainly has some support in *Austin*. See *Austin*, —— U.S. at —— n. 14, 113 S.Ct. at 2812 n. 14. Predictably, *Perez* now holds that even where the district court has made careful findings supporting the conclusion that the amount forfeited bore a rational relationship to the government's cost the forfeiture of a conveyance under § 881(a)(4) is always punitive. Where the forfeiture is completed before the criminal prosecution, the criminal prosecution violates the Double Jeopardy Clause and may not proceed. So *Halper*'s case-by-case approach, scrupulously followed by the district court here, has given way to a categorical approach in which the district court's conclusion that the forfeiture at issue is wholly remedial is irrelevant.

The practical consequences to the administration of justice in this circuit are enormous. The sequence of the proceedings in *Perez* is common. Many ongoing cases will be, and many completed cases may be, affected by this decision. And the problem is not unique to this court. Several circuits have been struggling with variants of it. *See, e.g., United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2nd Cir.1995); *United States v. Morgan*, 51 F.3d 1105 (2nd Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 171, 133 L.Ed.2d 112 (1995); *United States v. Baird*, 63 F.3d 1213 (3rd Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995) (No. 95-630); *United States v. Borromeo*, 995 F.2d 23 (4th Cir.), *opinion adhered to in part and vacated in part on reh'g*, 1 F.3d 219 (4th Cir.1993); *United States v. Salinas*, 65 F.3d 551 (6th Cir.1995); *United States v. Ursery*, 59 F.3d 568 (6th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No.

95-345); *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir.1994), *opinion amended on denial of reh'g*, 56 F.3d 41 (9th Cir.1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); *SEC v. Bilzerian*, 29 F.3d 689 (D.C.Cir.1994). It is an area that the Supreme Court should revisit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Criminal No. C-93-224

UNITED STATES OF AMERICA

v.

GLORIA PEREZ

[Entered: Nov. 2, 1994]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO DOUBLE JEOPARDY

The defendant filed a motion to dismiss her indictment on the grounds that she has previously been "punished" for the offense alleged in her indictment. Specifically, she was required to forfeit her vehicle to the government by order of the United States District Court for the Southern District of Texas in Cause No. H-94-0273 in which the government sought forfeiture under 21 U.S.C. § 881(a)(4). She argues the forfeiture of her expensive Suburban is punishment and her prosecution is now barred under the Double Jeopardy Clause of the United States Constitution. *United States v. Halper*, 109 S.Ct. 1892 (1989).

The Court took evidence on defendant's motion and at the hearing announced its decision denying her motion. In summary, the Court relies upon *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3109 (U.S. Aug. 8, 1994) (No. 94-231). Based upon the reasoning of *Tilley*, the Court rules that the forfeiture was remedial, not punitive, and thus "serve[d] the remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers" while also "reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity" and the like. *Tilley*, 18 F.3d at 299. While the object being forfeited and the statutes under which the forfeiture has taken place is different from those in *Tilley*, the Court finds that the forfeiture of instruments of drug trafficking serves the remedial purpose of removing the "tools of the trade" from the hands of those who would likely engage in further drug crimes. *See D.K.G. Appaloosas*, 829 F.2d at 544 ("the forfeiture provisions of Title 21 have a strong, remedial aim"—namely to realize Congress's goal of attacking the economic power bases of criminal organizations that existed at the time the statute was passed).

Based upon the testimony of Drug Enforcement Administration Special Agent Irr at the hearing, the Court calculates the approximate street value of the marijuana recovered to be $128,000 which will fall or already has fallen into the hands of a drug smuggling enterprise. The Court finds the value of the Suburban at the time of forfeiture to be approximately $23,000. The Court further determines the costs of

this prosecution at the time of the defendant's motion to be in excess of $11,000. This figure does not take into account the costs of the United States District Clerk's office, the costs of the U.S. Attorney's office, and the costs of the grand jury which indicted the defendant. This figure also fails to consider the costs borne by society from the resulting loss of over $128,000 in purchasing power which has occurred or eventually will occur when that amount of currency leaves the borders of this country. It also fails to account for the costs society bears from the fact that these unidentified drug traffickers are now $128,000 wealthier, and can "invest" those funds back into an illegal enterprise that will continue to poison a nation whose main defense is through the establishment and maintenance of executive agencies to combat drug use.

Accordingly, the Court holds that the value of the asset forfeited in this case, a 1993 Chevrolet Suburban, is not overwhelmingly disproportionate to the costs borne by the government in prosecuting this case or the costs to society from this defendant's alleged wrongful conduct. The instant forfeiture thus bears a rational relation to the goal of compensating the government and society for their losses. The Court therefore denies the defendant's motion to dismiss the indictment.

ORDERED this 2nd day of November, 1994.

/s/ H. W. Head, Jr.
H. W. HEAD, JR.
United States District Judge

APPENDIX C

1. Section 841 of Title 21, United States Code, provides, in relevant part:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 881 of Title 21, United States Code provides, in relevant part:

§ 881. Forfeitures

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or ex-

ported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Paraphernalia Control Act).

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) and (2) and any proceeds traceable to such property.